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No. 95-189

In The

Supreme Court of the United States

October Term, 1995

RICHARD SANDHAUS a/k/a DICK SANDHAUS, and SCIENCE FACTION CORPORATION, and DICK SANDHAUS PRODUCTIONS, INC.,

Petitioners,

vs.

STEPHEN WEINREICH,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the district court abuse its discretion in dealing with the issue of piercing the corporate veil, where the veil piercing issue was:

(1) Raised in respondent's complaint;

(2) Dealt with extensively in pre-trial discovery by both sides;

(3) Dealt with extensively at trial by both sides through the testimony of witnesses, the introduction of evidence by petitioners themselves on the issue, and the introduction without objection of voluminous documentary evidence by respondent bearing solely on the veil piercing issue;

(4) Briefed by both sides in post-trial closing arguments?

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TO THE HONORABLE SUPREME COURT:

Respondent, Stephen Weinreich, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by petitioners.

STATEMENT OF THE CASE

The issue of piercing the corporate veil to hold petitioners Richard Sandhaus ("Sandhaus") and Science Faction Corporation ("SFC") liable for contractual damages was first raised in respondent's Complaint. Though the specific words "piercing the corporate veil" were not used, respondent alleged sufficient facts to put petitioners on notice that he sought to pierce the corporate veil to hold Sandhaus and SFC liable under the May 1, 1978 contract between respondent and petitioner Dick Sandhaus Production, Inc. ("DSPI") (Agreement at Appendix K at 52a).

The complaint alleged that DSPI and SFC were affiliated companies, (paragraph 2), that Sandhaus was the principal of both (paragraph 4), that Sandhaus formed SFC to perform the same functions, and utilize the same assets as DSPI, (paragraph 11), and that Sandhaus commingled the assets of DSPI, SFC and himself personally, in order to deprive respondent of his rightful share of profits (paragraph 18) (Appendix A at 1a, 2a, 3a, 5a).

The veil piercing issue was also addressed by both sides in pre-trial discovery. Respondent was asked in a pre-trial deposition to explain the allegations of commingling contained in paragraph 18 of the Complaint. He testified that though the Silver System and its attendant technology was built by DSPI, "... it somehow drifted across the lines of the two corporations..." and came to be owned and exploited for profit by Sandhaus and SFC (Appendix B at 12a). This testimony went to the very heart of the veil piercing claim since respondent was

entitled under the contract between himself and DSPI to a 1/3 share of the profits derived from the sale or rental of the Silver System and all similar of derivative systems. The District Court characterized the circumstances surrounding the "purported sale" of the Silver System from DSPI to SFC as "suspect," and relied heavily on the suspect transfer of the key asset in the case from one dominated corporation to the other, in concluding that the corporate veil should be pierced (4/28/94 Opinion at Petitioners' Appendix E at 40a).

Respondent also testified in the same pre-trial deposition that the two corporations shared office space, and that he ". . . saw no attempt nor actual separation of the uses of equipment or furniture or anything else between the corporations, or for that matter Dick Sandhaus personally." (Appendix B at 15a).

The District Court cited the sharing of office space as another factor in its decision to pierce the corporate veil (Petitioners' Appendix E at 40a.)

Petitioner Sandhaus was also deposed on the veil piercing issue prior to trial. He was asked about the relationship between DSPI and SFC, specifically whether SFC was a subsidiary or affiliate of DSPI (Appendix C at 21a-24a). He was asked about the sharing of office space (Appendix C at 27a-30a) and he was asked about the "suspect" transfer of the Silver System from DSPI to SFC (Appendix N at 64a-66a).

Despite two pre-trial motions for summary judgment by petitioners, respondent's veil piercing claim survived to trial. In his July 24, 1989 decision on petitioners' first summary judgment motion, Judge Stewart narrowed the issues in the case by dismissing respondent's joint venture claims. However respondent's claim against SFC for breach of the May 1, 1978 written agreement was not dismissed. Since SFC was not a

signatory to the agreement (in fact it was not even in existence on May 1, 1978 when the agreement was signed) the only possible basis for a breach of contract claim against SFC was that petitioner Sandhaus had used his domination and control over DSPI and SFC to commingle the assets of the two corporations in order to deprive respondent of his rightful share of profits under the agreement. In the joint pre-trial order signed by Judge Sweet on November 29, 1993, SFC remained a defendant on the contract claim. The pre-trial order included the uncontested fact that Sandhaus was the president and sole shareholder of both DSPI and SFC. (Appendix L, Facts (3) and (4) at 55a). It also included the key factual allegation necessary for respondent's veil piercing claim;

> . . . defendant Sandhaus transferred the Silver System as an asset from defendant DSPI to defendant SFC without consideration.

(Appendix L at 56a, Contested Fact (7).

These allegations were sufficient under New York law to pierce the corporate veil. New York law on veil piercing was misstated by petitioners at page 4 of their Petition. In fact there are only two, not three, essential elements of a veil piercing claim in New York under *Morris v. New York State Department of Taxation and Finance*, 82 N.Y. 2d 135, 603 N.Y.S. 2d 807 (1993):

> . . . (1) The owners exercised complete domination of the corporation in respect to the transaction attacked; and
>
> (2) That such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury.

Clearly the allegations of total control of DSPI and SFC by Sandhaus, and the use of Sandhaus' total control to deprive respondent of his rightful share of profits under the agreement, by wrongfully transferring the Silver System from DSPI to SFC, were sufficient to put petitioners on notice going into the trial that respondent was seeking to pierce the corporate veil to hold all petitioners liable under the agreement between DSPI and respondent.

Moreover, the fact that veil piecing was an issue in this case was conclusively established by the actions of both sides at trial.

Much, if not most of respondent's evidence, admitted without objection by petitioners, was offered to establish the liability of SFC and Sandhaus personally under the agreement. A partial list of evidence offered by respondent under the veil piercing theory includes:

- 118 contracts between *SFC* and its customers for the sale or rental of laser light show systems under the agreement (Appendix O at 69a – admission of exhibits at trial, Appendix Q at 80a-82a – partial list of trial exhibits).

- 99 Reports filed by *SFC* with the U.S. Bureau of Radiological Health ("BRH") evidencing rentals by SFC of laser light show systems covered by the agreement; (Appendix O at 68a, Appendix Q at 76a-80a). The District Court relied on certain of these contracts and BRH reports in awarding contractual damages against petitioners (June 30, 1994 Opinion at Petitioner's Appendix D at 10a).

- A DSPI tax return establishing that for a period during which SFC and DSPI shared office space, DSPI's rent

was paid by SFC, a fact relied upon by the district court in piercing the corporate veil (Petitioners' Appendix E at 39a).

- A letter written on DSPI stationery to the BRH, requesting a regulatory variance for SFC (Appendix G at 41a). This letter was also relied upon by the district court in its decision to pierce the corporate veil; (Petitioners' Appendix E at 40a).

- A product brochure designating SFC as an "affiliate" of DSPI. This brochure, about which petitioner Sandhaus was questioned in his pre-trial deposition (Appendix F at 40a) was also relied upon by the trial court in piercing the corporate veil. (Petitioners' Appendix E at 40a).

Petitioners never once objected to any of this evidence. Moreover, petitioners offered their *own evidence* on the veil piercing issue, evidence which was not even arguably relevant to any other issue at trial. Specifically petitioner Sandhaus testified as follows at trial:

> Since its organization and through the period that it was actively engaged in business, did DSPI maintain its own bank accounts?
>
> Yes
>
> And did it maintain its own records of receipts and disbursements and general ledgers?
>
> Yes
>
> Did it file tax returns in its name?
>
> Yes. . . .
>
> Do you recall whether there are any officers or directors of DSPI other than yourself?

I believe, though I am not certain, that my father and/or sister are officers.

With respect to Science Faction Corporation, since its organization has it maintained its own bank accounts?

Yes

And since its organization, has it maintained its own financial records, including ledgers?

Yes

Has it filed its tax returns in its own name?

Yes

Do you know whether or not there are any officers and directors of Science Faction Corporation other than yourself?

Again, I am not certain, but it is possible that either my sister and/or father are officers.

When it was first incorporated, do you recall that was the case?

I believe that when it was first incorporated, my father and an attorney named John Dasher appeared as officers.

(Appendix E at 37a-39a).

The fact that DSPI and SFC maintained separate bank accounts and other financial records, filed separate tax returns and had their own officers and directories, was relevant to one issue and one issue alone — whether the corporate veil should be pierced.

Moreover, any doubt that the above testimony concerned the corporate piercing issue alone, was removed by petitioners' own post-trial written arguments in which they *specifically cited* this testimony in arguing that the corporate veil should not be pierced. (Appendix I, Petitioners' Post-trial Memorandum at 47a, Appendix J, Petitioners' Proposed Findings of Fact and Conclusions of Law at 50a). The testimony was not mentioned anywhere else in petitioners' post-trial submissions. Petitioners' claim that they only addressed the veil piercing issue in their post-trial submissions in response to respondent's raising it for the first time in his post-trial brief, is belied by the fact that petitioners' post-trial submissions were not made in response to respondent's brief (Appendix H at 44a-45a, handwritten note from petitioners' attorney at the bottom of letter to Judge Sweet dated 2/11/95).

Respondent, of course, also briefed the corporate piercing issue in his post-trial brief (Appendix M at 59a-63a).

At no time, either at trial, or in their post-trial briefs and motions, did petitioners ever object to consideration by the District Court of the veil piercing issue.

REASONS FOR DENYING THE WRIT

I.

RESPONDENT'S COMPLAINT AND THE PRE-TRIAL ORDER ALLEGED SUFFICIENT FACTS TO PUT PETITIONERS ON CLEAR NOTICE THAT HE WAS SEEKING TO PIERCE THE CORPORATE VEIL TO REACH PETITIONERS SFC AND SANDHAUS.

Under F.R.C.P. 8(a)(2), as interpreted by this Court, a complaint provides sufficient notice that a claim is being raised if it provides petitioners with:

> . . . fair notice of what plaintiffs' claim is and the grounds upon which it rests.

Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 102 (1957).

As set forth above, the New York Court of Appeals held in *Morris v. New York State Department of Taxation and Finance*, that there are two essential elements of a veil piercing claim under New York law:

> (1) Complete domination of the corporation with respect to the transaction in question; and
>
> (2) The use of such domination to commit a fraud or wrong against the plaintiff.

Morris, supra at 810-811.

Thus, in order for respondent's Complaint to have put petitioners on notice of a veil piercing claim, it had only to allege the domination by Sandhaus of SFC and DSPI, and the use of that domination to commit a wrong against respondent (*cf. Cornick v. Hi-Grade Cleaners Inc.*, 595 F. Supp. 718, 721 (N.D. Ill. 1984) — Complaint sufficient to state a claim for piercing the corporate veil where all three elements necessary for a veil piercing claim under Illinois law alleged in the complaint.).

In the instant case, sufficient facts were clearly alleged in respondent's complaint to put petitioners on notice of a veil piercing claim.

The allegation of control of SFC and DSPI was contained in paragraph 4 of the Complaint.

The use of such control to commit a fraud or wrong against respondent was alleged in:

(1) Paragraph 11 which alleged that Sandhaus formed SFC specifically to perform the same functions and utilize the same assets as DSPI with respect to the agreement between respondent and DSPI;

(2) Paragraph 18 which alleged that Sandhaus commingled the assets of DSPI, SFC and himself personally, in order to deprive respondent of his rightful share of profits under the agreement; and

(3) Paragraph 2 which alleged that SFC and DSPI were affiliated companies.

These allegations were clearly sufficient to put petitioners on notice that respondent sought to pierce the corporate veil and hold Sandhaus and SFC liable under the agreement between DSPI and respondent. In fact when petitioners argued in their Post-Trial Memorandum that the corporate veil should not be pierced they used the same language used by respondent in his Complaint, *commingling of assets*: ". . . there is no evidence that the business affairs of DSPI or SFC were *commingled* warranting the Court to disregard the separate corporate identities of those corporations." (Petitioners' Post Trial Memorandum, Exhibit I at 47a, emphasis supplied). Thus petitioners cannot now argue that they were not put on notice that respondent was seeking to pierce the corporate veil by the allegations of commingling in the Complaint.

Moreover, petitioners cannot deny that they were on notice of a veil piercing claim, since they addressed the issue in pre-trial discovery. Petitioners specifically asked respondent to explain the allegations of commingling in paragraph 18 of the Complaint,

in his pre-trial deposition. Respondent explained that by commingling he meant that though the Silver System and its attendant technology was built and developed by DSPI, Sandhaus used his control over both corporations to transfer it to SFC where it generated millions of dollars in revenue (Appendix B at 12a). Sandhaus too was asked in pre-trial depositions about the use of his control of DSPI and SFC to transfer the Silver System, under suspect circumstances, from one corporation to the other, a transaction which if allowed to stand would result in the denial of all recovery by respondent under the agreement (Exhibit N at 64a-66a).

The veil piercing issue was then preserved in the Pre-Trial Order wherein SFC remained a defendant in the breach of contract claim although it was not a party to the agreement and in fact did not even exist on May 1, 1978 when the agreement was signed. Since the only possible theory for a breach of contract claim against SFC was veil piercing, petitioners were clearly on notice that this claim remained. The essential facts for a veil piercing claim were also alleged in the Pre-Trial Order; Sandhaus' total control over DSPI and SFC was stated as an uncontested fact, and the transfer by Sandhaus of the Silver System for no consideration was alleged as a contested fact (Appendix L at 55a-56a).

II.

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION UNDER RULE 15(b) IN FINDING THAT THE ISSUE OF PIERCING THE CORPORATE VEIL HAD BEEN TRIED BY CONSENT.

As set forth above the issue of piercing the corporate veil was sufficiently raised in respondent's complaint, elaborated upon in discovery, and preserved in the Pre-Trial Order.

However, even if the issue had not been raised prior to trial, it was clearly tried by consent under Rule 15(b) which reads in pertinent part:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.

In this case, the issue of piercing the corporate veil was tried by both the express and the implied consent of petitioners. Therefore it was entirely proper for the District Court to treat the issue as if it had been raised in the pleadings.

It is the law in every Circuit that a District Court's decision to try an issue not raised in the pleadings under Rule 15(b) will only be reversed for an abuse of discretion (*Fowler v. Sponge Products Corp.*, 246 F.2d 223 (1st Cir.1957); *Weissman v. Freeman*, 868 F.2d 1313,1326 (2nd Cir.1989); *United States v. 47 Bottles*, 320 F.2d 564 (3rd Cir. 1963); *Stepp v. United States*, 297 F.2d 909 (4th Cir. 1953), *cert. denied*, 74 S. Ct. 627, 347 U.S. 933, 98 L. Ed. 1084 (1954); *Hall v. National Supply*, 270 F.2d 379 (5th Cir. 1959); *Lones v. Detroit, Toledo & Ironton R. Co.*, 398 F.2d 914 (6th Cir. 1968), *cert. denied*, 89 S. Ct. 714, 393 U.S. 1063, 21 L. Ed. 705 (1969); *Sunstream Jet Express v. Int'l Air Service Co., Ltd.*, 734 F.2d 1258, 1272 (7th Cir. 1984); *Nielson v. Armstrong Rubber Co.*, 570 F.2d 272, 276 (8th Cir. 1978); *Cole v. Layrite Prod. Co.*, 439 F.2d 958 (9th Cir. 1971); *Ellis v. Arkansas Louisiana Gas Co.*, 609 F.2d 436, 439 (10th Cir. 1979); *Laffey v. Northwest Airlines Inc.*, 567 F.2d 429, 477 (D.C. Cir. 1976), *cert. denied*, 98 S. Ct. 1281, 434 U.S. 1086, 58 L. Ed. 2d 792 (1976)).

In this case, it is absolutely clear from the record below that the issue was tried by consent and the District Court did not abuse its discretion in deciding the issue under Rule 15(b).

A simple test for consent under Rule 15(b) was set forth by the Tenth Circuit in *Hardin v. Manitowoc - Forsythe Corp.*, 691 F.2d 449, 456 (10th Cir. 1982):

> The test of consent is whether the opposing party had a fair opportunity to defend and whether he could have presented additional evidence had he known sooner the substance of the amendment.

Cf. Matter of Prescott, 805 F.2d 719, 725 (7th Cir. 1986).

Where as here, petitioners themselves offered evidence on the veil piercing issue during the trial, and argued the merits of the issue in post-trial briefs, consent under Rule 15(b) is clear:

> Consent *will* . . . be found when the party opposing the amendment himself produces evidence on the new issue.

Hardin, supra at 1457, emphasis supplied.

The reason for this rule is obvious. When a party itself introduces evidence on an issue, it cannot later claim that it had no notice that the issue was in the case:

> ". . . she introduced evidence as to compensation agreed to be paid by her for her transportation. *She, of course, could not be heard to say that the evidence was not addressed to a pertinent issue."* [*Vogrin v. Hedstrom*, 220 F.2d 863, 866 (7th Cir. 1955), *cert. denied*, 350 U.S. 845, 76 S. Ct. 86, 100 L. Ed. 753 (1955) emphasis supplied. *Accord Bradford Audio Corp v. Pious*, 392 F.2d 27, 73 (2nd Cir. 1968).].

"... the appellant itself put into evidence all of the state court record of the proceedings ..." [*Dunn v. Transworld Airlines, Inc.*, 589 F.2d 408, 413 (9th Cir. 1979)].

"The airline itself raised the issue ... in its own Trial Memorandum..." [*Fejta v. G.A.F. Companies, Inc.* 800 F.2d 1395, 1396 (5th Cir. 1986); *Federal Savings & Loan Insurance Corp. v. Hogan*, 476 F.2d 1182, 1188 (7th Cir. 1973)].

"... The fact that the issue ... was raised by the plaintiff during the trial .... precludes plaintiff from asserting Fed.R.Civ.P. Rule 8(c) as a bar ... because the issue was *necessarily* tried with the *express consent* of the plaintiff." [(citations omitted emphasis supplied); *Knudson v. Boren*, 261 F.2d 15, 19 (10th Cir. 1958); *Arkla Exploration Co. v. Boren*, 411 F.2d 879, 883 (8th Cir. 1969)].

"Both parties without objection offered evidence on the ... issue ..." [*Herrera v. Valentine*, 653 F.2d 1220, 1223 (8th Cir. 1981)].

As set forth above, petitioners put forth their own evidence on the veil piercing issue. Specifically, petitioner Sandhaus testified that SFC and DSPI maintained their own bank accounts, receipts and disbursement journals, and general ledgers, that each corporation filed its own tax returns, and that each had its own officers and directors (Appendix E at 37a-39a).

This testimony was not even arguably relevant to any other

issue at trial, and establishes without doubt that petitioners were clearly on notice that respondent was seeking to pierce the corporate veil between the corporations. In fact petitioners cannot even attempt to argue that the above testimony related to any other issue at trial, since they cited this testimony in *only one* section of each of their two post trial submissions, *the section in which they argued that the corporate veil should not be pierced:*

> 208. There is no basis on which the Court may disregard the separate corporate identities of SFC and DSPI. Each corporation maintained its own records, its own bank accounts, filed its own tax returns, and maintained separate records and books of account.

(Petitioners' February 14, 1994 Proposed Findings of Fact and Conclusions of Law, Appendix J at 50a). (*See also,* Petitioners' Post-Trial Memorandum of Law at Point IX, Appendix I at 47a).

Thus, there is no question that petitioners introduced their own evidence specifically on the corporate veil issue, and therefore that they consented to the trial of the issue.

Moreover, the fact that petitioners briefed the issue in their Post-Trial Memorandum independently established their consent to the trial of the veil piercing issue under Rule 15(b) (*cf. Dunn v. Transworld Airlines supra* at 413: "The airline itself raised the issue . . . in its own trial memorandum" *Dell v. Heard,* 532 F.2d 1330,1332 (10th Cir. 1976): ". . . the appellant responded to the defense in a memorandum submitted to the Court. Consequently, we hold that the issue was tried by the implied consent of the parties."

Consent to trial of an issue under Rule 15(b) may also be implied by a party's failure to object to evidence offered by the

other side on the issue, ". . . as long as the non-objecting party was fairly apprised that the evidence went to the unpleaded issue." *Neidland v. United States*, 338 F.2d 254, 258 (3rd Cir. 1964); *accord Mineral Industries, Etc. v. Occupational Safety*, 639 F.2d 1289,1293 (5th Cir. 1981); *Usery v. Marquette Cement Mfg. Co.*, 568 F.2d 902, 906 (2nd Cir. 1977); *St. Joe Minerals Corp. v. Occupational Safety and Health Review Commission*, 647 F.2d 840, 844 (8th Cir. 1981); *Dell v. Heard, supra*; *Rath Packing Co. v. Becker*, 530 F.2d 1295, 1308 (9th Cir. 1975), *affirmed on other grounds sub nom. Jones v. Rath Packing Co.*, 430 U.S. 519, 97 S. Ct. 1305, 51 L. Ed. 2d 64 (1977).

In this case respondent introduced voluminous evidence relevant to the veil piercing issue including 118 contracts between SFC and third parties for the sale or rental of laser light show systems, 99 reports filed by SFC with the BRH evidencing rentals, a letter written on *DSPI* stationery seeking a regulatory variance for *SFC*, a product brochure designating SFC and DSPI as affiliates, and a DSPI tax return establishing that SFC made rental payments for DSPI.

Petitioners never once objected to any of this evidence when it was introduced at trial, and their failure to object was properly used to infer consent for the veil piercing issue to be tried under Rule 15(b).

Moreover, petitioners also failed to object in their Post-Trial Memorandum and Proposed Findings of Fact and Conclusions of Law, to the issue being raised.[1] In *Rath Packing Co. v. Becker*, 530 F.2d 1295 (9th Cir. 1975), *affirmed on other grounds sub nom. Jones v. Rath Packing Co.*, 430 U.S. 519, 97 S. Ct. 1305, 51 L. Ed.

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1. In fact as set forth above, in their post-trial briefs, defendants not only failed to object to the veil piercing issue being raised, they substantively addressed the substance of the issue in their submissions.

2d 64 (1977), the Ninth Circuit held that such a failure to object may in and of itself infer consent under Rule 15(b):

> By failing to object, Rath may be deemed to have acquiesced in an expansion of the issues by the court from those set forth in the pre-trial order.

Rath, at 530 F.2d 1308.

Petitioners' claim that the Second Circuit's affirmation of the District Court's decision to try the issue, is in conflict with decisions in other Circuits, is totally without merit, for several reasons.

First, the District Court's decision to try the corporate piercing issue was not based, as suggested by petitioners, exclusively on petitioners' failure to object to evidence on the issue at trial. The issue was raised in the pleadings, dealt with in discovery, preserved in the pre-trial order, and petitioners themselves put in evidence on the issue at trial, and argued the issue in their Post-trial submissions. There was therefore ample basis, apart from petitioners' failure to object to respondent's evidence on the issue, for the District Court to infer consent under Rule 15(b).

Secondly, respondent's evidence on the veil piercing issue, was in fact predominantly, and in some cases exclusively, relevant to that issue alone. The DSPI tax return, establishing that SFC paid DSPI's taxes during a period of time when the two supposedly separate corporations shared office space, was clearly relevant only to the veil piercing issue, and petitioner Sandhaus was examined on this issue with respect to those tax returns at trial (Appendix P at 71a-73a). Similarly, the SFC product brochure, (Appendix F at 40a), though it was also used at

trial to identify a product, was principally relevant because it characterized SFC and DSPI as affiliates, a characterization cited by the District Court in its decision to pierce the corporate veil. And the 118 contracts and 99 BRH filings in the name of SFC, were also relevant *only if* the corporate veil was pierced, since SFC was not a direct party to the agreement. Finally, the letter on DSPI stationery, written by petitioner Sandhaus on behalf of DSPI, (Appendix G at 41a), though arguably relevant to other trial issues, was clearly most relevant to the veil piercing issue, as evidenced by the fact that is was cited by the District Court only in relation to that issue (Petitioners' Appendix E at page 40a).

Petitioners' argument, that simply because evidence relevant to an unpleaded issue may also have been peripherally relevant to an issue which was pleaded, a party's failure to object to such evidence may never be used to infer consent to the trial of the unpleaded issue, is contrary to clear case law. As stated above, the test as to when consent may be inferred under Rule 15(b) is a simple one — if the opposing party was aware that the issue was being raised, and he failed to object, consent may be inferred. *Hardin v. Manitowoc, supra* at 456. Thus, even where evidence may have been peripherally relevant to a pleaded issue, if the evidence was so obviously relevant to an unpleaded issue that the opposing party should have known that the unpleaded issue was being raised, a failure to object may be used to infer consent (*United States v. For Use of Seminole Sheet Metal v. SCI., Inc.*, 828 F.2d 671, 677 (11th Cir. 1987): ". . . . the evidence . . . was much more strongly relevant to the theory that the subcontract required SCI to transmit that payment to Floridaire, 'and this should have been apparent to defense counsel' "citing and quoting *Wallin v. Fuller,* 476 F.2d 1204, 1210 (5th Cir. 1973).

In this case, it not only "should have been apparent to defense counsel" that the veil piercing issue was being raised, it clearly *was* apparent, since respondent explicitly raised the issue

in his post-trial brief, and petitioners' offered their own evidence on the issue at trial, and argued the issue in their own post-trial submissions.

The cases cited by petitioners are clearly distinguishable from the instant case. In *Wesco Mfg., Inc. v. Tropical Attractions of Palm Beach, Inc.*, 833 F.2d 1484 (11th Cir. 1987), principally relied upon by petitioners, the key factor cited by the Eleventh Circuit in refusing to allow the trial of an issue by consent, was the fact that the attorney for the party seeking to try the unpleaded issue, did not raise the issue in his closing arguments (*Wesco* at 1487). In this case respondent not only offered evidence on the veil piercing issue at trial, he also argued the issue extensively in post-trial arguments (Appendix M at 58a-63a).

Similarly, in the other cases cited by petitioners, the decision not to try an issue by consent under Rule 15(b) was based on a finding that the opposing party was not aware that a new issue was being raised, when he failed to object to the introduction of evidence (*cf. Pariser v. Christian Health Care Systems, Inc.*, 816 F.2d 1248, 1253 (8th Cir. 1987): "Here we find *nothing* in the transcript to indicate that Pariser intended to try a tortious-interference claim or that the defendant in any way consented to trial of such a claim." (emphasis supplied).

In contrast the record in this case is full of clear indications that respondent intended to raise the corporate piercing issue — allegations in the Complaint, questions put to petitioner in pre-trial depositions, alleged facts in the pre-trial order, voluminous evidence introduced at trial, and extensive post-trial arguments on the issue. The record is also full of clear indications that petitioners consented to the trial of the issue — their own deposition questioning on the issue, the introduction of their own evidence on the issue, and the post-trial arguments they made on the issue.

CONCLUSION

For all of the reasons set forth above, respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

DANIEL MARTIN
Counsel of Record
Attorney for Respondent
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APPENDIX A — VERIFIED COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STEPHEN WEINREICH,

Plaintiff,

-against-

RICHARD SANDHAUS a/k/a DICK SANDHAUS and SCIENCE FACTION CORPORATION, and DICK SANDHAUS PRODUCTIONS, INC., and SCIENCE FACTION SYSTEMS,

Defendants.

VERIFIED COMPLAINT

Stephen Weinreich, as the Plaintiff herein, by his attorneys, Sandback & Birnbaum, for his complaint, upon his own knowledge and upon information and belief, respectfully alleges as follows:

1. That at all times hereinafter mentioned, plaintiff was and is a resident of the State of New Jersey, and currently resides in the Town of Monmouth Junction, State of New Jersey.

2. That at various times hereinafter mentioned, defendant Science Faction Corporation, an affiliate of defendant Dick Sandhaus Productions Inc., (hereafter "Science Faction") was and still is a corporation duly organized and existing under and by virtue of the laws of the State of New York, which at various times and from time to time has conducted business at various locations within the City, County and State of New York, including 445 Park Avenue, and 333 West 52nd Street, New York, New York.

Appendix A

3. That at various times hereinafter mentioned, defendant Dick Sandhaus Productions, Inc., (hereafter "Sandhaus Productions"), was and still is a corporation duly organized and existing under and by virtue of the laws of the State of New York and has at various times had its principal place of business at 1790 Broadway, New York, New York.

4. That defendant Richard "Dick" Sandhaus was and is the principal of all the defendant corporations and businesses.

AS AND FOR A FIRST CAUSE OF ACTION

5. Plaintiff repeats and realleges each and every allegation of the paragraphs of this complaint designated "1" through "4" with the same force and effect as if herein set forth anew.

6. That on or about January 1, 1978, the plaintiff, Stephen Weinreich, the defendant, Richard Sandhaus, and a third party, Michael Metz, formed a business the purpose of which was to design, develop and distribute Laser Light and derivative systems for commercial, entertainment, and other uses.

7. That subsequent to said date various laser light systems, techniques and technologies were developed and marketed through the joint efforts of all of the aforementioned parties, and that the plaintiff contributed substantial and significant time, effort and expertise, in good faith, to the endeavor.

8. That during the first part of 1978, the plaintiff, Stephen Weinreich, and the defendant Richard Sandhaus, agreed and contracted verbally and in writing, that the plaintiff was entitled to one-third (1/3) of all profits and assets of and belonging to and generated by said business for his contributions, and that neither

the plaintiff, Stephen Weinreich, nor the defendant, Richard Sandhaus, nor the aforementioned third party Michael Metz would each by himself separately own or control any more than a one-third (1/3) share of said business.

9. That on or about May 1, 1978, the defendant, Richard Sandhaus, acting on behalf of himself and the said business entered into and signed a written agreement specifying that said one-third (1/3) controlling interest and one-third (1/3) of the receipts and profits of said business belonged to and were due and owing to the plaintiff, Stephen Weinreich.

10. That Richard Sandhaus assumed responsibility for, among other things during the course of the operation of the business, handling the details of the marketing, sales, accounting, and distribution of the earnings and profits of the business, and the interest accrued thereon.

11. Subsequently, Richard Sandhaus formed a corporation known as "Science Faction" to perform, and which actually did perform, the same services as was performed by the aforesaid business and used the same assets, technology, information, hardware, and systems derived, developed and contributed by and from the plaintiff, Stephen Weinreich and of the aforesaid business, and used by the defendants.

12. Defendant Richard Sandhaus, both individually and in his corporate capacities has marketed, sold and rented the initial systems and technology derived by plaintiff, Stephen Weinreich, and the derivative systems which were generated thereby. Plaintiff has not received remuneration in proportion to the income that has been derived by defendants from the successful marketing and use of plaintiff's work product.

Appendix A

13. That to the present, plaintiff has not received any stock, assets, shares, interests, ownership, profits, or even any information concerning the above, pursuant to the aforesaid agreements, and which plaintiff is entitled as his full share of the above business from defendants, other than some nominal amounts.

AS AND FOR A SECOND CAUSE OF ACTION

14. Plaintiff repeats and realleges each and every allegation contained in the paragraphs of this complaint designated "1" through "13" with the same force and effect as if herein set forth anew.

15. Plaintiff has made demand of the defendants to account for their actions and to provide records and all other relevant information pertaining to the operation of the aforesaid businesses and to pay to the plaintiff his just and rightful share as per the aforementioned agreements, but defendants have absolutely refused to comply with these demands. An accounting of defendants' actions is therefore necessary and essential.

16. Plaintiff possesses no adequate or complete remedy at law for the injuries alleged herein. Plaintiff will be irreparably injured should equity not intervene.

AS AND FOR A THIRD CAUSE OF ACTION

17. Plaintiff repeats and realleges each and every allegation contained in the paragraphs of this complaint designated "1" through "16" with the same force and effect as if herein set forth anew.

Appendix A

18. Defendants, and particularly defendant Richard Sandhaus, have commingled the assets, liabilities, income, expenses and properties of defendant Science Faction, defendant Sandhaus Productions (including plaintiff's share thereof) as well as those properties and liabilities individually and personally owned by defendant Richard Sandhaus.

19. That the aforesaid intermingling is fraudulent and a breach of fiduciary duty on the part of defendants.

20. That the defendants hold in constructive trust for the benefit of plaintiff, all assets of Science Faction and Sandhaus Productions acquired after the 1st day of January, 1978, *i.e.* the date of the aforesaid agreement among the parties, or generated by said assets or businesses from said date.

21. That defendants additionally hold all of the assets alleged in paragraph "19", wherever their present location may be or whatever the present form they can be traced to, after the aforesaid commingling of assets and properties.

22. Plaintiff possesses no adequate or complete remedy at law for the injuries alleged herein. Plaintiff will be irreparably injured should equity not intervene.

AS AND FOR A FOURTH CAUSE OF ACTION

23. Plaintiff repeats and realleges each and every allegation contained in the paragraphs of the complaint designated "1" through "22" with the same force and effect as if herein set forth anew.

24. That Plaintiff is entitled to compensation and

remuneration for the valuable ideas and services rendered to the benefit of defendants, and to a share of the profits generated thereby, on the basis of *quantum meruit* and *quasi-contract.*

25. Plaintiff possesses no adequate or complete remedy at law for the injuries alleged herein. Plaintiff will be irreparably injured should equity not intervene.

AS AND FOR A FIFTH CAUSE OF ACTION

26. Plaintiff repeats and realleges each and every allegation contained in the paragraphs of the complaint designated "1" through "24" with the same force and effect as if herein set forth anew.

27. Defendants did fail to exercise ordinary care and did negligently maintain their records and fail to pay plaintiff or give notice to plaintiff relating to plaintiff's rightful one-third (1/3) share of Science Faction's assets and profits, all to the detriment and injury of plaintiff.

WHEREFORE, plaintiff demands judgment against the defendants as follows:

1. That the defendants be required to account to the plaintiff Stephen Weinreich for all monies and property received, disbursed, held and assigned by defendants and for all defendants' actions and dealings in connection with said laser light business and

2. That the defendants be required to pay to the plaintiff FIVE MILLION ($5,000,000.00) DOLLARS, or such sum of money which this Court finds is due and owing as a result of the

operation of defendants' laser light business (both with the parties together and subsequently by the defendants alone), and

3. That the assets and properties acquired by defendants after January 1, 1978, the date of an agreement between the parties, be deemed in constructive trust for the benefit of plaintiff, and

4. That the defendants be required to pay plaintiff the sum of FIVE MILLION ($5,000,000.00) DOLLARS, or such amount as this Court deems reasonable, for the valuable services rendered by plaintiff, and the profits generated thereby, in *quantum meruit* and *quasi-contract*, and

5. That the defendants be enjoined from disposing of any of the assets acquired after January 1, 1978, *i.e.* the date of the agreement between the parties, until such time as this Court may decide the rights and obligations of the parties, and

6. That the defendants pay the costs, disbursements and attorneys' fees necessary to bring and maintain this action, and

7. For such other and further relief as to this Court may seem just, proper and equitable.

Dated: Garden City, New York
May 19, 1983

s/ William A. Sandback
WILLIAM A. SANDBACK
A Member of the Firm of
SANDBACK & BIRNBAUM
1205 Franklin Avenue
Garden City, New York 11530
(516) 741-3222

APPENDIX B — EXCERPTS OF DEPOSITION OF STEPHEN WEINREICH

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

83 CIV 3966

STEPHEN WEINREICH,

Plaintiff,

-against-

RICHARD SANDHAUS a/k/a DICK SANDHAUS and SCIENCE FACTION CORPORATION, and DICK SANDHAUS PRODUCTIONS, INC., and SCIENCE FACTION SYSTEMS,

Defendants.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

MICHAEL METZ,

Plaintiff,

-against-

DICK SANDHAUS,

Defendant.

Appendix B

* * *

[311] become the 2000 series; they were then in turn used for the promotion and sale of other systems including, for example, the Kiss rodeo show, which I think is about as far as I can personally go in the chronology. But everything that the business did as a result of the sale and promotion of these systems is, of course, derivative.

Q Were you paid for any services rendered in connection with the Kiss rodeo show?

A No.

Q Are you making any claim in this lawsuit for services rendered in connection with the Kiss rodeo show?

A No.

Q You allege in paragraph 11 of the complaint that "subsequently Richard Sandhaus formed a corporation known as Science Faction to perform, and which actually did perform the same services as was performed by the aforesaid businesses and used the" — I hate to burden the record. When did you first become aware that a corporation called Science Faction Corporation was formed?

A I would say looking at Exhibit AT, that it was in summer, probably late summer of '78.

Q And then you say that Science Faction performed the same services as was performed by the aforesaid business. What services did Science Faction [312] Corporation perform after its organization?

Appendix B

A Science Faction Corporation was the embodiment of our business venture.

Q What services did it perform?

A Designed, manufactured, and sold, and rented laser entertainment systems and various other devices.

Q What facts do you have that Science Faction designed, manufactured, rented, and sold laser systems?

A For one, I did the major part of the design of the systems. For number two, I designed a trade show booth and was in attendance, I believe, at two shows, and it may have been used at for promoting Science Faction's sale of systems, and there were price lists published, and there were articles written in magazines, and papers filed in the B.R.H. for which I did some drawings regarding these systems.

And I had discussions and was in attendance with various of the employees of Science Faction and talked to them about the sale of systems, and as further systems were sold, Dick Sandhaus said, "We just sold one to France or this to wherever," and we had lists of how many systems and what types were sold, and I had arranged for the manufacture of parts for these systems, and I personal fabricated many of the systems. That's about as far as [313] I can go offhand without —

Q So that your prime testimony, where you said that you didn't have any facts by which you could support the allegation that Science Faction sold or rented the initial system and technology derived by the plaintiff, that was not correct?

A It was correct. You asked me whether I knew about the specifics of sales and who was paid and under what circumstances. I never saw money change hands and my information is as far as where these systems went, once they went out the door, is hearsay and a great deal of this information came from Dick Sandhaus, from his mouth, in which I said before, don't make these things facts.

Q But you did observe sales being made and systems being marketed by Science Faction Corporation?

A No, I don't believe I ever saw an actual sale in progress. I never saw money changing hands; I never saw anybody sign a contract for the sale of the system.

I saw systems manufactured and I saw them go out the door. I was never involved in the delivery of a system and so forth. I don't know, for example, if Xenon might have in fact been a rental, and I was never told the truth about it. But I saw it in operation at Xenon. So you are asking two different questions, and I have [314] answered each of them separately, and they are not conflicting answers.

Q Let me refer you to paragraph 18 of the complaint. Why don't you read that.

What facts do you know of to support the allegations contained in that paragraph of the complaint?

A For one, I saw a bill from a publicity company — I don't remember the name of the company right now, but they were people whom I had met at the office and who were doing publicity at Science Faction Corporation — and the bill was addressed to

Science Faction Corporation, and the subject of the bill was promotion of the Susan Berkley radio show, which was produced by Dick Sandhaus Productions.

As far as I know, it was the only business of Dick Sandhaus Productions at that time.

Q Do you have any other facts to support that allegation?

A The arrangement among Dick and myself and Mike Metz caused the Silver system to be built. And the Silver system was presumably built under the, or rather sold or rented through Dick Sandhaus Productions, as I was told by Dick, and yet somehow that system became part of a contract with Xenon for Science Faction to sell a system to Xenon, and so it somehow drifted across the [315] lines of the two corporations.

And, in fact, Dick really had no right to maintain Science Faction for himself, so that enters into it also.

Q You mentioned two things, a bill of Science Faction Corporation for a radio show, and you mentioned the rental of the Silver system by Science Faction Corporation to Xenon; is that correct?

A Right. Well, or sale or something. Rental of the Silver system in conjunction with the sale; I am not sure of the details.

Q Outside of that, what other facts do you have to support that allegation?

A There was also the office that Science Faction shared with Dick Sandhaus Productions and which, to the best of my

knowledge, was never devised in terms of what was used for either business.

Q You just testified that Science Faction Corporation rented or sold the Silver system to Xenon but —

A Rented, I believe.

Q Doesn't that directly contradict your earlier testimony where you said you had no facts as to whether Science Faction had rented or sold the Silver system to Xenon?

A No, as I just explained, that information came to me [316] by way of Dick Sandhaus; he told me that and I do not know that for a fact. I only know that from what Dick told me.

Q Is it your testimony that you had no other information as to sales or rentals of laser lighting equipment other than from what you learned from Dick Sandhaus?

A I believe that's correct.

Q But from Dick Sandhaus you did learn that Science Faction Corporation was renting or selling laser lighting equipment?

A Yes.

Q And, in fact, you did observe Science Faction Corporation marketing laser lighting equipment?

A Yes.

Appendix B

Q And you did, in fact, observe that Science Faction Corporation was delivering laser lighting equipment?

A Well, as I say, I knew it was being manufactured. I saw — we worked on systems being put together and, in fact, they were shipped out but I never saw anything delivered.

Q Did you ever see any invoices on Science Faction letterhead or billing head?

A I don't believe so.

[317] Q Did you ever see any invoices on Dick Sandhaus letterhead or billing head?

A I don't believe so.

Q Did you ever have any conversations with anyone where you learned that Dick Sandhaus was personally for himself selling laser lighting equipment or laser show equipment?

A As soon as Dick Sandhaus refused to distribute the stock in Science Faction Corporation, he was taking our interest.

Q That's not responsive. Did anyone ever tell you, did you learn from anyone, that Dick Sandhaus was acting other than as an officer of the corporation with regard to the sale or rental of any laser systems?

A No, I have no specific knowledge of that.

Q Other than the Silver system which you testified was manufactured by Dick Sandhaus Productions, Inc., and which

was later rented by Science Faction Corporation, are you aware of or do you have any facts of which you could support your allegation that the assets of Science Faction Corporation and Dick Sandhaus Productions, Inc., were comingled?

A I think I stated a couple of other reasons.

Q I said "assets."

[318] A The assets?

Q I said "assets." Just confine that to assets.

A There was a shared office, and I certainly, in viewing the operation of the office, saw no attempt nor actual separation of the uses of equipment or furniture or anything else between the corporations or, for that matter, for Dick Sandhaus personally.

Q Let's talk about, do you have any facts by which you can support the allegation that Dick Sandhaus Productions, Inc., commingled liabilities with Science Faction Corporation?

A That bill that I said before, and as far as the office is concerned, I repeat that.

Q Are there any other facts that you know of to support "joined" liabilities?

A I don't know that I can specifically tie the physical parts of the laser systems into that, but it appeared that they were, to use the word, joined.

Q What facts led you to believe that they were "joined"?

A As I just said, "I didn't like that word, but you used the word "commingled."

Q You did.

A And I just explained why I believe all those [319] assets and whatever were commingled.

Q So the two things that you can point to are the fact that the Silver system was manufactured by Dick Sandhaus Productions, Inc., but was ultimately rented to Xenon by Science Faction Corporation; that's one, right?

A Yes.

Q And the second thing is the fact that Dick Sandhaus Productions, Inc., and Science Faction Corporation appeared to share offices.

A That's two.

Q What other facts, then, do you have besides those two?

A The bill which I must say was one of the few bills that came into that office, that I ever saw, and it just happened to be billed to Science Faction for an expense of Dick Sandhaus Productions.

Q How are you aware that it was an expense of Dick Sandhaus Productions?

A Because it was for the Xenol, Berkley radio show which was the business of Dick Sandhaus Productions.

Q Other than that one bill, are you aware of any other facts?

A No.

Q So then the facts regarding the "commingling [320] of assets and liabilities" are restricted to the following three items: The rental of the Silver system by Science Faction Corporation, which was manufactured by Dick Sandhaus Productions, Inc.; the sharing of offices between Dick Sandhaus Productions, Inc., and Science Faction Corporation; and your observation of this bill; is that correct?

A Generally correct. You have somehow managed to have the Silver system manufactured by Dick Sandhaus Productions and I would say, and as I did say, it was sold through or rather — yes, sold through or rented through, or Dick Sandhaus Productions was somehow a vehicle involved in that procedure.

Q Do you have any facts by which you can support the allegation that Richard C. Sandhaus personally has commingled his properties and liabilities with Science Faction Corporation?

A Oh, for the — under the circumstances of his incorporation, he is the sole owner of Science Faction Corporation; the assets, his assets, were a third interest in what Science Faction is doing now, and he has taken all of it, and so Science Faction is intimately commingled with Dick Sandhaus and by the office arrangement with Dick Sandhaus Productions.

[321] Q Do you have any facts by which you can support the allegation that any liabilities of Dick Sandhaus personally have somehow been commingled with Science Faction Corporation and Dick Sandhaus Productions, Inc.?

A No.

Q Do you have any facts by which you can support the allegation that the income of Richard Sandhaus, Science Faction Corporation, and Dick Sandhaus Productions, Inc., have been commingled?

A As I said, for the moment, Dick Sandhaus, as far as I know, owns all of Science Faction Corporation.

Q Answer the question. I said the income of Richard Sandhaus, Science Faction Corporation, and Dick Sandhaus Productions, Inc.

A I don't have any facts, no.

Q Do you have any facts to support the allegation that the expenses of Dick Sandhaus, Science Faction Corporation, and Dick Sandhaus Productions, Inc., have been commingled?

A I already stated that.

Q I would like you to answer that question.

A Please read it back.

(Question read)

APPENDIX C — EXCERPTS OF DEPOSITION OF RICHARD SANDHAUS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

83 CIV 3966

STEPHEN WEINREICH,

Plaintiff,

-against-

RICHARD SANDHAUS a/k/a DICK SANDHAUS and SCIENCE FACTION CORPORATION, and DICK SANDHAUS PRODUCTIONS, INC., and SCIENCE FACTION SYSTEMS,

Defendants.

880 Third Avenue
New York, New York

September 5, 1994
10:15 A.M.

Continued DEPOSITION of Defendant RICHARD SANDHAUS, taken by Plaintiff, pursuant to Agreement.

* * *

[98] compliance with whatever the new regulations are.

This Exhibit 4 refers to specific wording on a warning logo.

Appendix C

It's like a label that appears on a product, and it would certainly be true that as of this date, and this letter is from July of '81, that we would have been required to tell the BRH, to file the supplemental information to them, to the effect that any previously manufactured products were now in compliance with this new regulation.

So, it would certainly make sense that we would have made a filing that would cover both the 1003 and the 2000 series, because those are all products that would have had to — if they were to be used — would have to carry this new wording on the label.

MR. KLEINBAUM: Both are products manufactured prior to the date of that letter.

Q. What had happened to the 1003 series at that point in time?

A. Just sat on the shelf.

Q. It wasn't sold?

A. No.

Q. Now, I believe your testimony has been that Dick Sandhaus Productions, Inc. and Science Faction Corporation were two separate corporations.

A. That's true.

[99] Q. They never had a relationship to each other when Science Faction Corporationcame into existence?

Appendix C

A. What do you mean by "relationship"?

Q. Other than renting space, as you have previously said, and perhaps being physically housed in the same building, there was no relationship in regard to the products being manufactured or the marketing of any particular products? There was no enterprise between the two of them?

What you are trying to say is that they did different things?

A. That's correct.

Q. Would it be fair to say that Science Faction Corporation was never held out to be a subidiary of Dick Sandhaus Productions, Inc.?

A. True.

What do you mean by "held out"? Represented to be?

Q. Represented to the public as being a subsidiary in any way connected with Dick Sandhaus Productions, Inc.

A. To my recollection, it was never represented to be a subsidiary of the other.

MR. SANDBACK: Could we have this marked as [100] an exhibit.

(A brochure was marked as Plaintiff's Exhibit 5 for identification.)

Q. Would you take a look at that. Do you recognize that?

A. Yes.

Q. What is it?

A. It's a piece of sales literature that describes the 2000, the SFC 2000 series system, and it has photographs of visual displays that are created by them.

Q. Was that prepared by Science Faction Corporation?

A. Yes.

Q. Do you remember when it was prepared?

A. Yes. It would have been in 1979 sometime, I think. Yes, it would have been early '79.

Q. If you look on the last page, the writing that appears in the small print at the very foot of the page, could you tell me what that says there?

A. Yes, it says "Science Faction Corporation is an affiliate of Dick Sandhaus Productions, Inc."

Q. Did you approve that writing to appear on that particular document?

A. Yes. I probably wrote it.

[101] Q. Could you tell me how you define affiliate, the word affiliate?

A. Just as some kind of association, affiliation, association .

Appendix C

Q. In the year 1979, did you prepare other types of promotional materials for your 2000 series?

A. Probably, although I can't specifically recall what it would have been right now.

Q. Do you have a recollection as to whether or not you again held out Science Faction Corporation to be an affiliate of Dick Sandhaus Productions, Inc.?

MR. KLEINBAUM: When you say "held out," you said that — or the material contained a statement that it was an affiliate of Dick Sandhaus Productions, Inc.

MR. SANDBACK: Correct. I will rephrase the question to say that.

A. I really don't recall without seeing the stuff. It's a long time ago.

Q. From 1979 to the present, have you ever made representations to anyone, either in any of the promotional material or verbally, that Science Faction Corporation was either an affiliate or subsidiary of Dick Sandhaus Productions?

[102] MR. KLEINBAUM: Separate the question so that there is no confusion.

MR. SANDBACK: I don't think there is confusion in the question. I never at any time before or after '79 represented that Science Faction or Dick Sandhaus Productions, Inc. was an affiliate — a subsidiary of the other.

Q. You are not sure if they were an affiliate?

Q. Clearly, here, I have said it, and I have at various times done things to help refer public relations, sales and marketing for purposes of helping associate my personal name with Science Faction Corporation, and I did that as a particular intentional effort in the early days of Science Faction Corporation, because my name personally was fairly well known to various people in the entertainment business that could utilize our services.

Q. Your personal name does not appear as an affiliate there. It is a corporate name.

A. It's the corporate name, but the corporate name happens to be my personal name or happens to include my personal name, and it just seems less ostentatious to say it's an affiliate of a corporation than to say that Dick Sandhaus is the president of Science Faction Corporation. [111] leasing it or an outright sale?

A. I have never referred to it as a lease. It's a full service rental.

Q. Can you categorize it as a rental?

A. Yes.

Q. Now, the arrangements that you have discussed before concerning Science Faction Corporation and Dick Sandhaus Productions, Inc., besides Science Faction Corporation apparently leasing space from Dick Sandhaus Productions, Inc., was there any other arrangement in regard to the sharing of personnel or the sharing of certain physical equipment, etc.?

MR. KLEINBAUM: I am going to object to that question in terms that it is not related in time and it deals — it proceeds on a premise that there is a rental of space by Science Faction from Dick Sandhaus Productions.

MR. SANBACK: I think that's what the testimony has been this morning.

MR. KLEINAUM: I am not sure that that is entirely true. I don't think that has been the testimony. I don't think that was the testimony this morning. Maybe I am mischaracterizing it.

A. I testified that Dick Sandhaus's office space, [112] which was also used by Science Faction and for which Science Faction paid —

MR. KLEINBAUM: All right.

A. There was also joint use by the two corporations of, you know, telephone systems, Xerox machines, of like, general office equipment, and that was stuff jointly paid for.

Q. How about personnel?

A. It would only have been in the case of secretarial.

Q. Were any invoices ever sent to customers of Science Faction Corporation by Dick Sandhaus Corporation, Inc.? That answer requires either a yes or a no.

A. It seems by definition that the answer is no.

Q. Is it no?

Appendix C

A. Science Faction invoices its customers, and Dick Sandhaus invoices its customers.

MR. KLEINBAUM: Let me explain what he is driving at. He's saying if there are transactions between those two companies as a result of which Science Faction may or may not have paid some expenses or Dick Sandhaus paid some expenses of Science Faction, were those charges ever reflected by corresponding invoices from one corporation?

[113] THE WITNESS: You are asking if Science Faction and Dick Sandhaus sent invoices to other parties?

MR. SANDBACK: I think I should clear the question up.

Q. Did Dick Sandhaus Productions, Inc., to your knowledge, ever bill anyone on behalf of Science Faction Corporation?

MR. KLEINBAUM: I misunderstood the question.

A. Not to my recollection.

Q. Were there any accounts receivable attributable to Science Faction Corporation made payable to Dick Sandhaus Productions, Inc.?

A. Not that I can presently recall. It's possible that that could have happened.

Q. Under what circumstances could it have happened.

A. I can't imagine.

MR. KLEINBAUM: He said it's possible but he doesn't recall.

Q. It's possible that Dick Sandhaus Productions dealt with some customer, party, at some time and that subsequently Science Faction dealt with that same customer, party, and that by mistake the customer, party, would have paid the wrong company. But, I mean, I don't recall any [114] incident of that. But that's a long time ago.

Q. Did Science Faction Corporation ever hire Dick Sandhaus Productions, Inc. to ever do any marketing or customer relationships for it?

A. Not that I can specifically recall.

Q. I am sorry. Do you want to continue?

A. No. I will just leave it at that.

Q. Did Science Faction Corporation ever have its corporate offices at any other location other than where Dick Sandhaus Productions, Inc. had its corporate offices?

A. Yes.

Q. Where was that and when was that?

A. Science Faction took office space at 333 West 52nd Street sometime in 1979. That space was used solely by Science Faction Corporation.

Q. Was it used for a particular purpose?

A. The space?

Q. Yes, to your knowledge.

A. For the business of Science Faction Corporation

Q. In other words, as far as you knew, their entire business was transacted out of this particular location?

A. No. Well, that became the case. When the space on 52nd Street was first taken, it was used only for [115] manufacturing and testing and as a demonstration facility, not for administrative purposes, although subsequently it came to be used for all purposes.

Q. Did Dick Sandhaus Productions, Inc. remain at 445 Park Avenue?

A. Yes.

MR. KLEINBAUM: Until when?

MR. SANDBACK: We are talking about the time period of '78, '79.

MR. KLEINBAUM: Okay.

Q. Subsequent to '78, '79, did Science Faction Corporation ever merge its space with Dick Sandhaus Productions, Inc. again?

A. No, not to my recollection.

Appendix C

Q. To your knowledge, did Dick Sandhaus Productions, Inc. ever pay any expenses for Science Faction Corporation or vice-versa?

A. I am not sure if the technically correct answer is yes or no. I will tell you what kinds of things that did happen.

Q. Okay.

A. Sometime probably in late '79 or early '80, Dick Sandhaus Productions became dormant, didn't conduct any activities. Yes, there were things, leases in the name [116] of Sandhaus Productions, which were paid directly by Science Faction Corporation that would have been leased for office space, by lease payments on Xerox machines, that sort of thing, that were after a certain date utilized only by Science Faction Corporation, and they were paid for directly by Science Faction Corporation. Is that the kind of thing you are asking me about?

Q. It may or may not be. Let's take the Xerox machine as an example.

A. Right.

Q. Was this a lease where you would be able to buy the machine at the end of the lease?

A. It was actually a purchase from the beginning, and you simply paid it over a period of five years or something.

Q. And did that asset get passed over?

A. Originally all the paper work would have been in the

name of Dick Sandhaus Productions, but it was in Science Faction.

Q. Was there a provision under your lease, holding it as Dick Sandhaus Productions, Inc., to sublet it to a corporation such as Science Faction Corporation?

A. Well, it wasn't really sublet. It was sold.

Q. Dick Sandhaus Productions, Inc. assigned their [117] right, title and lease to Science Faction?

A. Yes.

Q. So, there was a transfer on the books?

A. Right.

MR. SANDBACK: Could we have this marked as an exhibit.

(An 1120 tax form was marked as Plaintiff's Exhibit 6 for identification.)

Q. Let me show you this exhibit, which is marked as Plaintiff's Exhibit 6.

MR. KLEINBAUM: That is a U.S. form, 1120, for 1978.

Q. Do you recognize that?

A. Yes.

Appendix C

Q. You assisted your attorney in providing it to us pursuant to discovery requests.

MR. KLEINBAUM: He didn't assist. He gave it to me and I gave it to you. I assisted him.

Q. Would you take a look at the third page, which should read, "Section 1561, Apportionment."

A. Yes.

Q. Can you state on the record how this apportionment took place between Dick Sandhaus Productions, Inc. and Science Faction Corporation?

[118] MR. KLEINBAUM: If you know.

Q. If you know, of course.

A. No. I really don't know.

Q. Could you consult with your accountant or some other financial officer to determine how that apportionment took place, and we will leave a space in the record for your answer?

A. Yes. I don't even know what it is.

(INSERT): _____

_____

_____

Q. On the same exhibit, Exhibit 6, would you turn to page 7, which should be line 26, other deductions.

A. Yes.

Q. Under the line which indicates provisional and consulting fees, there is a figure there of $62,667.

A. Yes.

Q. Can you tell us who was retained by Science Faction Corporation during the time period in question as either a professional or on a consulting basis?

MR. KLEINBAUM: Let me ask you a question. What is the relevancy here What are you trying to get at?

MR. SANDBACK: The relevancy is that I want to. . . .

* * *

APPENDIX D — EXCERPTS OF TRIAL TRANSCRIPT DATED JANUARY 12, 1994

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

83 Civ. 3966 (CES)

January 12, 1994
10:00 a.m.

STEPHEN WEINREICH,

Plaintiff,

v.

RICHARD SANDHAUS a/k/a DICK SANDHAUS and SCIENCE FACTION CORPORATION and DICK SANDHAUS PRODUCTIONS, INC.,

Defendants.

Before:

HON. ROBERT W. SWEET,

District Judge

APPEARANCES

DANIEL MARTIN
Attorney for plaintiff

GERALD M. KLEINBAUM
Attorney for defendants

Appendix D

* * *

[818] believe, are listed as officers. But I am not sure of the answer with respect to directors. You would know that better than I.

Q. Where there any other? You mentioned, just going back for a minute in time, the first time that you met Steve Weinreich and what he told you about his engineering background.

Were there any other occasions in which he told you —

MR. MARTIN: Objection, your Honor.

Q. — about his engineering background?

THE COURT: Overruled.

A. I recall that when we were in Harrisburg, Pennsylvania, for this BRH, state radiation control directors conference, that in front of me he introduced himself to others there as a mechanical design engineer.

Similarly, I heard him introduce himself to others in that way at other times but that I don't recall specifically.

Q. Did there ever come a time when the title to the Silver System was transferred from DSPI to SFC?

A. Yes, there was.

THE COURT: What was the form of that transaction?

THE WITNESS: As I understand it —

[819] THE COURT: No, never mind that. Just what happened?

THE WITNESS: The accountant set up what I think was called an exchange account between SFC and DSPI. The Silver System was given some value and then assigned to SFC.

In exchange for that, there were things that SFC paid for, for example, rent and other office equipment rentals and things like that that were exchanged that SFC paid for on behalf of DSPI. That is my best understanding of that.

THE COURT: No papers?

THE WITNESS: Only some entry in a tax filing. But, no, I did not have an agreement prepared between the two corporations.

Q. Was there ever a time when you — when I say "you," I am speaking about you now as an officer, as a representative of SFC — or SFC went to a trade show in the summer of 1978?

A. Yes. We were an exhibitor at, I don't recall the name of the show, but it was a trade show that was directed at and attended by owners and operators of nightclubs and discoteques. I believe it was at the very end of June of 1978. I am not certain if I was there on behalf of DSPI or SFC at that time. SFC was incorporated in June of 1978. That's my answer.

* * *

APPENDIX E — EXCERPTS OF TRIAL TRANSCRIPT DATED JANUARY 14, 1994

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

83 Civ. 3966 (CES)

January 14, 1994
9:50 a.m.

STEPHEN WEINREICH,

Plaintiff,

v.

RICHARD SANDHAUS a/k/a DICK SANDHAUS and SCIENCE FACTION CORPORATION and DICK SANDHAUS PRODUCTIONS, INC.,

Defendants.

Before:

HON. ROBERT W. SWEET,

District Judge

APPEARANCES

DANIEL MARTIN
Attorney for plaintiff

GERALD M. KLEINBAUM
Attorney for defendants

Appendix E

Sandhaus - redirect

* * *

[1147] of complying with the standard, with the performance standard, that I regarded as being so different from any other laser light show projectors that I felt it was appropriate to file an initial report.

Q. Why wasn't an initial report filed for the Laserchaser II later in 1986?

A. That's because, in the course of this litigation, plaintiffs have made extensive efforts to confuse the Court about what different technologies were being referred to for regulatory designation purposes as 2000, and so we decided at that point to start calling something something else.

Q. Since its organization and through the period that it was actively engaged in business, did DSPI maintain its own bank accounts?

A. Yes.

Q. And did it maintain its own records of receipts and disbursements and general ledgers?

A. Yes.

Q. Did it file tax returns in its name?

A. Yes.

Q. Is it continuing to do so today?

A. Yes. Well, it is continuing to file tax returns in its own name.

Q. Do you recall whether there are any officers or directors of DSPI other than yourself?

[1148] A. I believe, though I am not certain, that my father and/or sister are officers.

Q. With respect to Science Faction Corporation, since its organization has it maintained its own bank accounts?

A. Yes.

Q. And since its organization, has it maintained its own financial records, including ledgers?

A. Yes.

Q. Has it filed its tax returns in its own name?

A. Yes.

Q. Do you know whether or not there are any officers and directors of Science Faction Corporation other than yourself?

A. Again, I am not certain, but it is possible that either my sister and/or father are officers.

Q. When it was first incorporated, do you recall that that was the case?

Appendix E

A. I believe that when it was first incorporated, my father and an attorney named John Dasher appeared as officers.

Q. Earlier this morning you were questioned about a February 1978 memorandum between DSPI and Mr. Bud Praeger of ESP with respect to Foreigner. Could you explain what that memorandum was?

* * *

APPENDIX F — TRIAL EXHIBIT 20

(Omitted here but submitted separately as Lodging Appendix)

APPENDIX G — TRIAL EXHIBIT 31

DICK SANDHAUS PRODUCTIONS, INC.
445 PARK AVENUE
NEW YORK, NEW YORK 10022
(212) 688-7786

August 23, 1978

Hearing Clerk
Food and Drug Administration
Room 4-65
5600 Fishers Lane
Rockville, Maryland

Dear Sir:

Pursuant to 1010.4 of the Regulations for the Administration and Enforcement of the Radiation Control for Health and Safety Act of 1968, Science Faction Corporation (hereinafter referred to as "manufacturer") hereby requests a variance for its demonstration laser system, SFC-1003.

The following will describe the product and the means by which equivalent protection is provided.

1. The product is a demonstration laser system that is intended to display visual images (abstract, representative and/or textual) for artistic, entertainment, education and/or advertising purposes. Images may be displayed for public viewing in public venues (theatres, auditoriums, arenas, discotheques, nightclubs, stadiums, parks, etc.) and/or in restricted "studio" venues for still photography; motion photography and/or videotaping. The product achieves its intended functions by *scanning* patterns on projection

Appendix G

screens, walls, ceilings, floors and other screen-like surfaces. The *scanned* patterns and/or the *scanning* beams (as they may be visual in airborn scattering media) provide aesthetically appealing visual representations which may constitute art, entertainment or information display for the purpose of advertising, education, etc.

2. The product incorporates a CW laser. If the output of such laser were restricted to Class I, or even to Class II, the *scanned* CW laser radiation would be invisible or nearly invisible when *scanned* over areas in excess of one hundred square feet. Typically, the product is used to scan over areas in excess of two hundred and fifty square feet.

3. We propose to deviate from the requirements of the standard for demonstration laser products by incorporating in our product a certified Class IV CW laser.

4. Such incorporation will allow the product to scan effectively visible patterns in excess of two hundred and fifty square feet. This is a necessary function of the product.

5. Equivalent protection is provided by *scanning*, and displaying visual images according to parameters (radiant power output, whole angle divergence of beam, scan frequency, scan amplitude, distance from laser to viewer or diffuse target, beam diameter at distance) set forth in "tabulated values and limits for product's accessible emissions", which is included in the product report submitted by BRH Division of Compliance. To verbally summarize these values and limits: product is used in such manner as to ensure that all accessible emissions are within the Class I limit. Because the *scanning* of the product's CW

laser radiation is of primary importance to ensuring this equivalent protection, a "no-scan safeguard" is incorporated in the product. Scan safeguard is accomplished by reading voltage across a resistor wired in series with product's galvanometer scanners to sense scanners' *outputs*. If scanners do not receive proper control signal and/or malfunction (e.g. damaged coil), voltage outside normal range will be sensed across resistor and cause a physical shutter (1/8" black aluminum) to be activated to prevent emission of unscanned radiation from product.

6. It is requested that the variance be granted with no limit to its time duration. Manufacturer anticipates production of not more than ten such products.

7. The fully-operational prototype product is mobile and will be used in multiple locations. Product will be stored at manufacturer's address.

8. Additional, more detailed information has been reported, per 1002.10, to Director, BRH.

Please direct all correspondence to: Mr. Dick Sandhaus, President; Science Faction Corporation; c/o Dick Sandhaus Productions, Inc.; 445 Park Avenue; New York, New York 10022.

Sincerely,

DICK SANDHAUS

DS:ess

APPENDIX H — FEBRUARY 11, 1994 LETTER FROM GERALD KLEINBAUM TO JUDGE SWEET WITH HANDWRITTEN NOTE

GERALD M. KLEINBAUM
ATTORNEY-AT-LAW
90 PARK AVENUE
NEW YORK, NEW YORK 10016-1387
(212) 245-6400

February 11, 1994

FACSIMILE
791-8558

Honorable Robert W. Sweet
United States District Court Judge
United States Courthouse
Foley Square
New York, New York 10007

Re: Weinreich v. Sandhaus, et al
83 Civ. 3966 (CES)

Dear Judge Sweet:

I herewith request an extension (a) to submit Defendants' proposed findings of fact and conclusions of law and memorandum of law which are due today to Monday, February 14, 1994, and (b) an extension of the time for argument to Tuesday or Wednesday, February 15 or 16, 1994, at the Court's convenience. The Wednesday date will be less convenient for Mr. Martin, but he would be able to attend.

The request is made because as a result of the snow

Appendix H

emergency the office will close at 1:00 p.m. today and because of staffing problems I will be unable to serve and file my papers before the end of the day.

I have discussed the proposed extension with Mr. Martin who has no objection thereto.

Respectfully yours,

s/ Gerald M. Kleinbaum
GERALD M. KLEINBAUM

GMK/vdb

cc: Daniel Martin, Esq.

[Handwritten on bottom of letter]:

Dear Dan, This will confirm our conversation that I will not read your papers until I have served defendants' papers. Judge Sweet extended d's time to serve and file until Monday & scheduled [remainder of copy is illegible].

APPENDIX I — EXCERPTED DEFENDANTS' POST TRIAL MEMORANDUM OF LAW WITH PROOF OF SERVICE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

83 Civ. 3966 (CES)

STEPHEN WEINREICH,

Plaintiff,

-against-

RICHARD SANDHAUS a/k/a DICK SANDHAUS and SCIENCE FACTION CORPORATION, and DICK SANDHAUS PRODUCTIONS, INC.,

Defendants.

DEFENDANTS' POST-TRIAL MEMORANDUM OF LAW

Preliminary Statement

Defendants, Richard C. Sandhaus also known as Dick Sandhaus ("Sandhaus"), Dick Sandhaus Productions, Inc. ("DSPI"), and Science Faction Corporation ("SFC"), respectfully submit this Post-Trial Memorandum of Law upon the conclusion of the trial of this action held before the Judge January 5-7, 1994, January 10-14, 1994, and January 17-18, 1994.

The trial of this action concerned two claims by plaintiff and counterclaims by defendants. Plaintiff's first claim is for breach

of contract based on a letter written by plaintiff dated April 18, 1978, which was signed by DSPI on or about May 1, 1978 (the "Letter", Exhibit 1)), and provides, among other things, that in consideration of plaintiff's design work on a laser light show then currently in production, plaintiff would be entitled to a one-third

* * *

POINT IX.

THERE IS NO EVIDENCE WARRANTING THIS COURT TO DISREGARD THE CORPORATE ENTITIES OF DSPI AND SFC TO IMPOSE ANY PERSONAL LIABILITY UPON SANDHAUS

There is no evidence that Sandhaus comingled his personal affairs with either the business affairs of either DSPI or SFC. Therefore, there is no basis to disregard the corporate entities of DSPI or SFC to impose any personal. . . .

Moreover, there is no evidence that the business affairs of DSPI or SFC were comingled, warranting the Court to disregard the separate corporate identities of those corporations. Each corporation maintained its own bank accounts, check books, ledgers and filed separate and independent tax returns.

There is no evidence that Sandhaus personally ever sold or rented any laser light show system.

* * *

Appendix I

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

I, Gerald M. Kleinbaum, being sworn, say: I am not a party to the action, am over 18 years of age and maintain my offices at 90 Park Avenue, New York, NY 10016-1387.

On February 14, 1994, I served the within Defendants' Proposed Findings of Fact and Conclusions of Law, and Post-Trial Memorandum of Law, by facsimile transmission sent to:

Daniel Martin, Esq.
(609) 771-9342,

and by Express Mail by depositing a true copy thereof in a post-paid wrapper, in an official depository under the exclusive care and custody of the U.S. Postal Service within New York State, addressed to:

Daniel Martin, Esq.
816 Silvia Street, Suite 800 B
Trenton, NJ 08628-3240

s/ Gerald M. Kleinbaum
GERALD M. KLEINBAUM

Sworn to before me this
14th day of February, 1994

s/ Robert C. Holstein
Notary Public

APPENDIX J — EXCERPTED DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

83 Civ. 3966 (CES)

STEPHEN WEINREICH,

Plaintiff,

-against-

RICHARD SANDHAUS a/k/a DICK SANDHAUS and SCIENCE FACTION CORPORATION, and DICK SANDHAUS PRODUCTIONS, INC.,

Defendants.

DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendants, Richard C. Sandhaus also known as Dick Sandhaus ("Sandhaus"), Dick Sandhaus Productions, Inc. ("DSPI"), and Science Faction Corporation ("SFC"), respectfully submit their proposed Findings of Fact and Conclusions of Law upon the conclusion of the trial of this action held January 5-7, 1994, January 10-14, 1994, and January 17-18, 1994.

As these proposed Findings of Fact and Conclusions of Law are being submitted in advance of receipt of plaintiff's proposed Findings and Conclusions and Post-Trial Brief, defendants

request leave to amend or supplement this submission if plaintiff's proposed Findings and Conclusions or Brief discloses the existence of factual or legal issues which are not addressed below.

* * *

208. There is no basis on which the Court may disregard the separate corporate entities of SFC and DSPI. Each corporation maintained its own records, its own bank accounts, filed its own tax returns, and maintained separate records and books of account.

209. The Letter is merely a letter of intent and not a binding agreement. The intention of the parties should be determined by the language of the document where the language is clear. The first paragraph of the Letter says it is to "confirm our intention . . .", and the third paragraph says, "This letter is not intended to be a complete agreement . . .". It is clear that the parties did not intend the Letter to be an agreement. The "complete agreement" contemplated by Weinreich concerned many material elements not embodied in the Letter. It is undisputed that a "complete agreement" was never reached between the parties and that a "complete agreement" was never executed.

210. In addition, there was no agreement between Weinreich and DSPI as to the definition of "net profits" in the letter prior to the time the Letter was signed, at the time the Letter was signed, or thereafter. Agreement as to the meaning of "net profits" was essential to the formation of a binding contract since it was part of the formula on which Weinreich's compensation for his design service was to be based. The computation of "net

profits" in the Letter was left to future agreement between Weinreich and DSPI since

* * *

APPENDIX K — MAY 1, 1978 AGREEMENT

STEPHEN WEINREICH
5101 GORNIAK DRIVE
PARLIN, NJ 08859
(201) 727-7466

April 18, 1978

Dick Sandhaus
Dick Sandhaus Productions
1790 Broadway
New York, New York 10019

Dear Dick:

This will confirm our intention that all design work done by Stephen Weinreich for the laser light show currently in production is for the consideration of a 33 1/3% interest in the net profit earned by sale or rental of this or similar or derivative systems at prices and conditions mutually agreeable to Sandhaus and Weinreich, such agreement not to be unreasonably withheld.

Any funds drawn by Stephen Weinreich and charged against this project (other than expense reimbursements) will be considered as drawings on profits.

This letter is not intended to be a complete agreement, but is to express the general intent of both parties and is to govern in this matter until such an agreement is executed.

Your signature below indicates your agreement with these terms.

Yours truly,

s/ Stephen Weinreich
Stephen Weinreich

ACCEPTED by illegible
date 5/1/78

APPENDIX L — EXCERPTED JOINT PRE-TRIAL ORDER

10/27/93

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

83 Civ. 3966 (CES)

STEPHEN WEINREICH,

Plaintiff,

-against-

RICHARD SANDHAUS a/k/a DICK SANDHAUS and SCIENCE FACTION CORPORATION and DICK SANDHAUS PRODUCTIONS, INC.,

Defendants.

JOINT
PRE-TRIAL ORDER

Plaintiff Stephen Weinreich (hereafter, "plaintiff" or "Weinreich") and defendants Richard Sandhaus, also known as Dick Sandhaus ("Sandhaus"), Science Faction Corporation ("SFC") and Dick Sandhaus Productions, Inc. ("DSPI") submit this Pre-Trial Order in accordance with the rules of this Court and the instructions of the Honorable Naomi Reice Buchwald, United States Magistrate Judge, including the instructions in her letters of September 14, 1993, and October 15, 1993.

1. *Jurisdiction* — This Court has jurisdiction over this

matter pursuant to 28 U.S.C. 1331 because plaintiff Stephen Weinreich ("Weinreich" or "plaintiff") is a citizen of New Jersey and the defendants are citizens of New York, and the amount in controversy, exclusive of interest and costs, exceeds the jurisdictional amount.

2. This is a non-jury case.

* * *

4. *Plaintiff's Claims* — There are two causes of action remaining in plaintiff's complaint. The first is plaintiff's claim for breach of an alleged agreement under which plaintiff was to receive one-third of the profits from the sale or rental of certain laser light show systems. Defendants understand this alleged agreement to be set forth in the document annexed as Exhibit A. The second claim in the action is a quantum meruit claim for damages for the reasonable value of services rendered by plaintiff to defendants. Plaintiff demands judgment against defendants on each of the two causes of action, in the amount of $5 million, with interest, costs and disbursements, and attorneys' fees.

5. *Defendants' Claims for Relief*

Defendants' Answer alleges eight offsets and counterclaims against plaintiff, as follows:

A. The first, second, and fourth counterclaims by DSPI allege in substance that plaintiff falsely and fraudulently represented to defendants Sandhaus and DSPI that he was a design engineer with a degree in engineering, and that he had the requisite skill and competence to work on the design and laser lighting systems; that defendants Sandhaus and DSPI relied on

these false and fraudulent representations and were induced to (a) engage plaintiff to perform design work on the Foreigner system and other laser lighting and special effects systems; (b) sign the document annexed as Exhibit A; (c) that plaintiff's work was incompetent and

* * *

6. *Uncontested Facts* — The parties stipulate that the following facts are not in dispute in this action, each party reserving the right to object to the materiality or relevancy of any such stipulated fact.

(1) Richard C. Sandhaus, sued herein as Richard Sandhaus, also known as Dick Sandhaus, is now, and has been at all times mentioned in the complaint, a resident of the City, County and State of New York.

(2) The defendant SFC is, and was at all times mentioned in the complaint, a New York corporation organized on June 7, 1978.

(3) At all times since SFC's incorporation, Sandhaus has been the president and sole shareholder of SFC.

(4) At all times since DSPI's incorporation, Sandhaus has been the president and sole shareholder of DSPI.

(5) At all times since its incorporation, SFC has been engaged in the business of designing, selling, and renting laser systems and services for display and entertainment purposes and producing laser shows.

Appendix L

(6) Plaintiff is and was at all times mentioned in the complaint a citizen of the State of New Jersey. He currently resides at 14 Norton Road, Monmouth Junction, New Jersey. In 1977, 1978, and 1979, plaintiff resided at 5101 Gorniak Drive, Parlin, New Jersey 08859.

(7) Plaintiff is not a college graduate. He has

* * *

(4) The document annexed as Exhibit A was signed by Sandhaus in his capacity as President of DSPI.

(5) The document annexed as Exhibit A was signed by defendant Sandhaus personally.

(6) Immediately prior to signing the document annexed as Exhibit A Sandhaus asked Weinreich what Weinreich meant by the word "similar" or "derivative" in the documents and Weinreich responded that he meant "the same system except that maybe the color is blue."

(7) After defendant SFC was formed in 1978, defendant Sandhaus transferred the Silver System as an asset from defendant DSPI to defendant SFC without consideration.

(8) Since its inception not all of the business of SFC has involved lasers.

(9) In 1978-1979, SFC offered for sale or rent other products and services, besides the sale or rental of the Silver or 2000 Series Systems.

Appendix L

(10) In or about October, 1988, Sandhaus provided a complete list of all of the products or projects of SFC to the court appointed expert.

(11) Methods of scanning other than by the use of galvanometer scanners were common in laser light systems in 1978.

(12) The scanning method chosen is a significant design characteristic of a laser light show system.

* * *

APPENDIX M — EXCERPTS OF CLOSING ARGUMENTS AND BRIEFS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

93 Civ. 3966 (CES)

STEPHEN WEINREICH,

Plaintiff,

-against-

RICHARD SANDHAUS A/K/A DICK SANDHAUS and SCIENCE FACTION CORPORATION and DICK SANDHAUS PRODUCTIONS, INC.,

Defendants.

CLOSING ARGUMENTS AND BRIEFS

Plaintiff, Stephen Weinreich, by his attorney Daniel Martin, hereby submits these closing arguments and briefs in the above entitled action.

I. *Plaintiff's Contentions of Fact*

A. *Liability of Defendants Richard Sandhaus a/k/a Dick Sandhaus, Science Faction Corporation (SFC) and Dick Sandhaus Productions, Inc. (DSPI) for breach of contract*

(1) *Exhibit 1 is a valid enforceable agreement*

Exhibit 1 was signed by plaintiff Stephen Weinreich on April 18, 1978, and by defendant Dick Sandhaus on May 1, 1978.

Appendix M

Defendants made four arguments against the enforceability of the agreement at trial. None of these arguments have any merit:

Defendant Sandhaus claimed that plaintiff induced him to enter into the agreement by falsely claiming to be an engineer (Trial Transcript (TT) at pages 811-812). This claim method of figuring net profits was not difficult to arrive at in this case, is confirmed by defendants' own Affidavit in support of motion for summary judgment (EX 1045) and trial testimony (TT 1103).

(2) *Defendant Sandhaus personally and the corporate defendants DSPI, and SFC, are all jointly and severally liable under Exhibit 1.*

Defendant Sandhaus testified at trial that he signed Exhibit 1 as president of DSPI. Presumably defendants will attempt to convince the Court that only DSPI, a dormant corporation, is therefore liable under the agreement. Overwhelming factual evidence, and clear legal precedent, belie this claim.

First of all, Exhibit 1 was signed by defendant personally. The letter was addressed to Dick Sandhaus, *at* Dick Sandhaus Productions, but there is no reference under Mr. Sandhaus' signature to his position as president of DSPI.

Moreover, the documentary evidence, supported by defendant Sandhaus' own trial testimony, makes it abundantly clear that DSPI and SFC were treated by defendant Sandhaus as his own "alter egos" with no personalities of their own. Judgment against all, jointly and severally, is therefore mandated under New York law (*Oriental Commercial and Shipping Co. Ltd v. Rossell,* 609 F. Supp 75, 78 (SDNY 1985) (See legal arguments infra for further discussion of this issue). "Alter ego" evidence includes the following":

Appendix M

(a) Defendant Sandhaus testified that he transferred title to the Silver System, upon which the agreement was based, from DSPI to SFC with no papers to support the transfer (TT 818-819).

(b) He further testified that the transfer was made because he was the sole shareholder of both corporations and wanted to transfer the laser portion of DSPI's business to a new corporation (Exh 1029, Sandhaus deposition, 1/14/86 at Page 68).

(c) After taking title to the Silver System, SFC rented it to Xenon (and elsewhere) in its own name (TT 1122). SFC's responsibility to satisfy all obligations of the Silver System (including the agreement to pay plaintiff 1/3 of the net profits from the Silver and similar or derivative systems, under Exhibit 1), is thus clear.

Yet defendant testified that SFC in no way agreed to assume any responsibilities under Exhibit 1 (Exhibit 1028, Sandhaus deposition at 9/5/84, page 57-58).

(d) SFC's 1978 tax return referred to DSPI and SFC as ". . . component members of a controlled group . . ." and later tax returns (Ex 462-464, 1050) apportioned taxable income between the two corporations;

(e) SFC's 1979 advertising literature (Ex 20) referred to itself as, ". . . an affiliate of DSPI . . .", though defendant Sandhaus testified (Supra) that the Silver System was transferred from DSPI to SFC in order to remove DSPI from the laser light show business. Obviously the continuing "affiliation" was solely based upon Mr. Sandhaus' total control over both corporations.

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(f) A letter sent by Mr. Sandhaus to the BRH on August 23, 1978 requesting a variance for the Silver System for *SFC* was sent on *DSPI stationary* (Ex 1044).

(g) Finally, defendant Sandhaus specifically referred to DSPI and SFC as his alter egos on a number of occasions in his trial testimony:

1. In referring to DSPI's rental of office space, Mr. Sandhaus stated: "I was the subtenant and ESP was the prime tenant of the space." (TT 791)

2. At TT 908, Mr. Sandhaus again referred to himself as the corporation, (in this case SFC):

"So I marketed myself to him by direct mail and on the telephone";

3. And at TT 1149, Mr. Sandhaus said, ". . . I am DSP, Dick Sandhaus Productions, Inc."

(3) *All 2000 Series Systems, including various versions of electronic controls, and custom specials including the Hollywood Palace and the Empire State Building Systems are similar or derivative of the Silver System under Exhibit 1.*

As discussed at length below, Brian O'Brien, though appointed by the Court as an independent expert, exhibited bias in favor of defendants from the very beginning of his involve-

* * *

voluntarily severed his business ties with defendants in September, 1979, defendants continued to request his services in connection with all of their projects.

(2) ***Defendant Sandhaus personally, and the corporate defendants, DSPI and SFC, are all jointly and severally liable to pay plaintiff for his services in quantum meruit***

As discussed in part (2) above, defendant Sandhaus treated DSPI and SFC as his alter egos, routinely shifting assets and business between the companies, based upon his total control of both companies. Under New York law, all defendants are therefore liable to pay plaintiff in quantum meruit for his services.

* * *

same period of time, which contain different entries (Ex 11, pages D4, D5).

(3) Mr. Sandhaus falsely claimed in a pre-trial Affidavit (Ex 7) that he prepared *all* the ledgers; at trial he admitted that he prepared only *some* of them (TT947-949).

B. ***Defendant Richard Sandhaus treated the corporate defendants SFC and DSPI as his alter egos, exercising total control of their operations, and transferring assets freely between them. All defendants are therefore jointly and severally liable to plaintiff in quantum meruit and under Exhibit 1***

As discussed above, defendant Sandhaus exercised total control over SFC and DSPI. He transferred title to the Silver

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System from DSPI to SFC with no paperwork or corporate resolutions supporting the transfer (TT818-819). He then went on to rent the Silver System through SFC (TT1122), while claiming that SFC had no responsibility to satisfy obligations of the Silver System (Ex 1028 at pages 57-58). Mr. Sandhaus freely ignored the separate corporate identities of SFC and DSPI (Ex 1050, 462-464, 20, 1044) and considered both corporations to have no identity separate from his own (TT 791, 908, 1149). The alter ego doctrine, as set forth in *Oriental Commercial v. Rossell* 609 F.Supp. 75, 78 (SDNY 1985), clearly applies in this case:

> "To apply alter ego doctrine to justify the disregard of a corporate entity, the court must determine that there is such unity of interest and ownership that separate personalities of the corporations no longer exist, and that failure to disregard the corporate form would result in fraud or injustice." (Cf. *Gorrill vs. Icelandair/Flugleider* 761 F2d 847, 853 (2d Cir 1985); *Walter Heller & Co. v. Video Innovations* 730 F2d 50, 53-54 (2d Cir 1984); *Cooperstein v. Padricisn Estates* 499 NYS 2d 423 (AD 2 Sept 1986)

* * *

APPENDIX N — EXCERPTS OF DEPOSITION OF RICHARD SANDHAUS

* * *

[68] Productions, Inc. assigned its right, title or interest in that particular system to some other entity?

A. Yes.

Q. To whom was the right, title and interest to that system assigned?

A. Science Faction Corporation.

Q. Would you tell me the circumstances under which that assignment took place?

A. What do you mean, circumstances?

Q. How did it come about that the rights to this particular system were assigned by Dick Sandhaus Productions, Inc. to Science Faction Corporation?

A. I am the sole shareholder of both of those corporations, and I made a decision somewhere in the middle of '78 to establish the corporation called Science Faction Corporation. That would deal only in the area of laser display and laser related businesses while concurrently, I was operating the previous existing corporation, Dick Sandhaus Productions, Inc. for otherwise unrelated things in the area of radio production and syndication, things like that. And in order to keep projects totally discrete from one another and to simplify bookkeeping and all kinds of things, I just separated the areas of business that were unrelated to each other.

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[69] Q. For purposes of bookkeeping, did you assign an asset value to this system when you made the transfer?

A. Yes.

Q. What was that value?

A. I can't remember what it was, but it was determined just by looking at all of the individual cost items that Dick Sandhaus Productions had incurred in producing the system, which would be material costs, component costs, payroll costs.

Q. Did you have this particular asset value memorialized in some fashion in any of your books that you kept?

A. I am not sure what you mean by "memorialized." If you are asking me how it was sort of kept in the way of bookkeeping?

Q. Was it reduced to writing in any form in any of your corporate books?

A. Well, I don't think there was some specific document that refers to this and only this, but I can tell you that the manner of bookkeeping was like an exchange item between the two corporations, and had to do with the fact that there was office space that was leased by Dick Sandhaus Productions which was also used by Science Faction Corporation, so that there were a number of things that [70] Science Faction started directly paying for, things like office space, and so just those things were just kept track of and numbers were exchanged.

Q. Is it your testimony, then, that Science Faction established a debt to Dick Sandhaus Productions, Inc. and this asset was transferred over in lieu of that debt?

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MR. KLEINBAUM: I am not sure that is what his testimony is.

MR. SANDBACK: That's what I am trying to find out.

MR. KLEINBAUM: I don't think there was a characterization.

Just answer the question.

A. I don't really know the technically correct answer. Very simply, there were —

MR. KLEINBAUM: Answer the question, if you know the answer.

A. Science Faction paid for things that Dick Sandhaus benefited from in effect for exchange for the asset value of that Silver System.

Q. For purposes of bookkeeping, you must have known at that point in time how much you were setting off one against the other; is that true?

* * *

APPENDIX O — EXCERPTED JANUARY 11, 1994 TRIAL TRANSCRIPT (ADMISSION OF EXHIBITS)

(Sandhaus - direct)

[631] MR. KLEINBAUM: If your Honor pleases, may I just look at them for a minute?

THE COURT: Yes.

MR. KLEINBAUM: And ask Mr. Sandhaus to look at them as well?

THE COURT: No. You look at them and tell me whether or not there is any objection to their entry.

All right, they are admitted subject to a motion to strike.

MR. KLEINBAUM: Motion to strike. The documents here listed as affidavits because the witness is on the stand and these would be inappropriate documents.

THE COURT: 6 is admitted.

MR. KLEINBAUM: Excuse me?

THE COURT: 18 and 19 are admitted. 21 is admitted, 22, 23, 24, 26.

MR. MARTIN: Did you get 25, your Honor?

THE COURT: You didn't offer it.

MR. MARTIN: Right. I'm sorry.

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THE COURT: 31 is admitted, 34.

Tell me what 34 through 132 are.

MR. MARTIN: They are itinerary reports sent by Mr. Sandhaus to the Bureau of Radiological Health informing them that a laser light show will be performed at a certain location on a certain date. Each of them is a separate [632] report.

THE COURT: Is there any identification as to the time and unit?

MR. MARTIN: Yes, there is.

THE COURT: They will be admitted.

(Plaintiff's Exhibits 6, 18, 19, 21, 22, 23, 24, 25, 26, 31, 34 through 132, 133 through 137, 168 through 199, 202, 204, 315, 318 through 321, 324 through 441, 443 through 449, 458, 460 and 461, 1018 through 1031 for identification were received in evidence)

THE WITNESS: It is not actually true that there was such identification as to product.

THE COURT: 133 is admitted, 134, 135.

MR. KLEINBAUM: Your Honor, may I reserve the right to strike with respect to 137?

THE COURT: Yes, you can reserve until the cows come home.

136, 137, 168 through 199, 202, 203, 204 isn't evidence, but I will take it.

315, I will take, 318, 319, 320, 321.

I take it that 324 through 441 — boy, are you going to have a nice time on appeal with this record?

324 through 441 are similarly —

MR. MARTIN: Those are contracts that were provided in discovery for shows, rental shows, for, in most [633] cases, rental shows, sales contracts.

THE COURT: All right. 433 through 449 are admitted.

MR. KLEINBAUM: Did your Honor mention 443 through 449?

THE COURT: Yes.

MR. KLEINBAUM: Your Honor, I move to strike on the ground that the witness is here and these affidavits, having been made prior to this case. He is here, subject to examination. I don't believe they are admissible under Rule 803.

THE COURT: 458 is admitted. The motion is denied. 460, 461 are admitted. 1018 through 1031 are admitted.

MR. MARTIN: Your Honor, there is one additional exhibit —

MR. KLEINBAUM: I also call your attention, your Honor,

to Exhibits 315, 318, and 319. They are responses to requests for admissions. We reserve all our rights as we reserved them in the documents.

MR. MARTIN: No objection.

I have one more.

BY MR. MARTIN:

Q. Exhibit 1042, could I just ask you to identify this, Mr. Sandhaus?

* * *

APPENDIX P — EXCERPTED JANUARY 13, 1994 TRIAL TRANSCRIPT

(Sandhaus - cross)

* * *

[1116] then at some point SFC began paying the rent.

THE COURT: Interchangeably, right?

THE WITNESS: No. There was a point at which it changed and then it continued to be that way.

BY MR. MARTIN:

Q. In fact, Mr. Sandhaus, DSPI didn't pay any rent from June 1, 1979, through May 31, 1980, isn't that right?

A. That —

Q. Let me refresh your recollection your recollection by showing you —

A. That could well be true.

Q. Let me show you what has been marked 1050 for identification, the corporated tax return for DSPI for the period June 1, 1979, through May 31, 1980.

MR. KLEINBAUM: What exhibit number is that?

MR. MARTIN: 1050.

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Q. Do you recognize that?

MR. KLEINBAUM: Have you previously marked that?

THE COURT: No.

MR. MARTIN: No, this is new.

THE COURT: That is a tax return, is it, for?

MR. MARTIN: DSPI.

Q. First of all, is this the tax return for DSPI for that period?

THE COURT: I'm sorry. I missed the period.

[1117] A. I'm not certain because there don't appear to be signatures on this.

MR. KLEINBAUM: What year is that?

MR. MARTIN: June 1, 1979, through May 31, 1980.

Q. Wasn't this produced in discovery as the —

A. I don't recall. Oh, I see. The Xerox says "Copy" on it.

MR. KLEINBAUM: Is this a copy of the return?

MR. MARTIN: That's it, yes.

MR. KLEINBAUM: Maybe that will help you.

MR. MARTIN: No, this is Science Factions, unless it is attached.

THE WITNESS: No, it is not.

MR. MARTIN: I offer this 1050 in evidence.

THE COURT: Admitted.

(Plaintiff's Exhibit 1050 for identification was received in evidence)

BY MR. MARTIN:

Q. Mr. Sandhaus, does 1050 refresh your recollection as to whether DSPI paid any rent during that period?

A. Yes, it refreshes my recollection.

Q. It didn't?

A. There is nothing listed at the line "Gross rents" so it tells me that.

THE COURT: I suppose you would like to have it [1118] admitted.

MR. MARTIN: Didn't I offer it?

THE COURT: Maybe you did.

MR. MARTIN: Let me offer 1050.

THE COURT: It is admitted.

BY MR. MARTIN:

Q. You testified earlier about a contract that Science Faction entered into with Aucoin Management concerning the Kiss project?

A. I don't recall if I testified about it. I am familiar with the project.

Q. Let me show you a document marked 1018 for identification.

MR. KLEINBAUM: Has that been produced?

MR. MARTIN: Yes, it has.

BY MR. MARTIN:

Q. I ask you if you can identify that document.

A. Yes. It lacks my signature, but it is signed by Aucoin Management. It is an agreement between Kiss/Aucoin Management Inc. and SFC.

Q. Under the contract, Science Faction was to design and build a system and to perform certain —

MR. KLEINBAUM: Objection, your Honor.

THE COURT: Sustained.

Appendix P

Q. What were Science Factions obligations under the

* * *

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* * *